IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 453 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE D.K.TRIVEDI
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MUSTUFA ABDUL KALUBHAI REHMAN KHATKI
Versus
STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 453 of 1999
MRS SHILPA J UNWALLA for Petitioner No. 1
THROUGH JAIL for Petitioner No. 1
MR BY MANKAD APP for Respondent No. 1

CORAM : MR.JUSTICE D.K.TRIVEDI
and
MR.JUSTICE H.H.MEHTA

Date of decision: 02/07/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE H.H.MEHTA)

#. Accused of Special Case No. 3 of 1997 has by preferring this Criminal Appeal under Section 374 (2) of the Criminal Procedure Code, 1973 (for short "Cr.P.C."), challenged the correctness and legality of the judgement dated 30th March, 1999 rendered by Additional Sessions Judge, 2nd Court, Bharuch by which, he has been convicted under Section 235 (2) of Cr.P.C. for an offence punishable under Section 20 (b) (i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the Act") and is sentenced to undergo R.I. for two and half years and to pay a fine of Rs.10,000/-, (Rs. Ten Thousand Only) and in default to undergo further imprisonment for six months for possession of contraband substance "Ganja". He is also separately sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.1,00,000/- (Rs. One lakh only), and in default, to undergo further imprisonment for one week for a substance "Charas".

#. The complainant - Dhanjibhai Badaji Damor, who was Police Inspector, LCB Bharuch was on duty of night patrolling. During that patrolling at about 00.16 hours on 12th March, 1997, he received a secret information from the secret informant that one Mustufa Abdulraheman Khatki, who is staying in residential house No. 4027 situated in Mullavad in Ankleshwar Town was keeping and in possession of and selling narcotic substance like Ganja and charas. Immediately on receipt of such information, the complainant wrote down that information and sent a copy of it to his immediate superior officer i.e. Sub-Divisional Police Officer at his residence. On receipt of such information, Sub-divisional Police Officer Shri U.K. Brahambhatt immediately rushed to the Ankleshwar police station. On the basis of the written information, an entry No.3 was made in station diary at 01.15 hours. Panch witnesses were called. Complainant in company of Sub-divisional Police Officer, other Police Head Constables, Constables and panch witnesses reached to the place of residence of appellant. As search was to be carried out during the night hours, it was not possible for the complainant to obtain a warrant for the search from the Magistrate. He made an entry No. 5 of 1997 at 2.45 hours, wherein, reasons were stated as to why warrant was not obtained. The police head constables, who accompanied the complainant, were asked to come with materials for packing and sealing. As per the complaint, they reached to the residence of appellant, at 3 o'clock. The complainant and the members

of the raiding party went to the first floor of the building in which the appellant was residing. The doors were closed. On knocking at the doors, the appellant opened the doors. Thereafter, it was inquired from the appellant as to what was his name. The appellant gave his name and address to the members of raiding party. The appellant was informed of that he was keeping narcotic substance and doing illegal activities and therefore, search was required to be made. He was also informed of that he was entitled to call any superior officer, in whose presence search could be made by the members of raiding party. He was also informed of that Shri Brahambhatt, Sub-Divisional Police Officer was also a Gazetted Officer. The members of the raiding party also allowed the appellant to search the police officers and other members of the raiding party but nothing was found from them. Then on making search of the premises of the residential house of the appellant, one aluminium tin lying on plastic table on side of sewing machine was found. On opening that aluminium tin, it was found that there was a Ganja article and nearby that place one scale and other weight measurements were also found on sewing machine. Photographer was called. A goldsmith was also sent for with his scale and weight. In presence of panch witnesses that Ganja article was weighed. It was found that Ganja was weighing about 650 grams. Then on making further search, in one plastic bag, Charas was found in plastic small bucket beneath a rack of vessels in the rear room. It was weighed in presence of panch witnesses and it was found to be Charas weighing about 165.500 grams. The complainant in presence of panch witnesses took necessary samples of Ganja and Charas separately as per the prescribed procedure. That samples were seized and sealed by affixing the seals. All the articles found from the residential house of the appellant were seized under panchnama. The appellant was asked as to whether he was having any pass or permit to possess said two articles. The appellant failed to answer and therefore, the complainant lodged his complaint in Ankleshwar Police Station on 12th March, 1997 at 9 a.m.. That complaint came to be registered as CR. No. II.312 of 1997. The complainant handed over the custody of accused together with muddamal articles seized from the residence of appellant, samples of that articles, alongwith complaint to P.S.O. Ankleshwar Police Station. The police station officer called for Writer - Police Head Constable, who was in charge of the muddamal articles of other cases lying in Ankleshwar Police Station. P.S.O. handed over all the articles to Writer - Police Head Constable. Thereafter, the samples of muddamal articles were sent to Forensic Science Laboratory (hereinafter referred as

"F.S.L." for short) alongwith covering letter in a sealed and in intact condition. The F.S.L. Officer of F.S.L. has issued report with regard to said two substances and it was opined that one of two articles was Ganja and other was Charas. As per the say of P.S.O., the investigation of the case was handed over to P.I. Shri M.L. Parmar, who conducted the investigation and on completion of police investigation, he filed chargesheet against appellant in the Court constituted under the Act on 21.5.1997. That chargesheet came to be registered as NDPS Case No. 3/97.

#. The learned Judge of the Trial Court framed a charge at Ex.3 on 26.8.1997 and as per charge, the appellant was asked to meet with the case for the offences punishable under Sections 8 (c), 9, 10, 20 (1) (2) and 20 (1) (b) of the Act. On recording plea of the appellant at Ex.4, he pleaded not guilty to the charge. The prosecution has examined in all 12 witnesses in support of the case of prosecution against the appellant. The prosecution has also produced documentary evidence. After recording of evidence of prosecution witnesses was over, the circumstances appearing against the appellant in evidence were brought to and explained to the notice of appellant and he was asked to explain the circumstances appearing against him. The appellant has denied practically the entire case of the prosecution. As per the say of appellant currency notes were found from his house but that money was not with regard to sale of narcotic substance but that money received by him was for repairing work of house of his brother and that amount was of son-in-law Ibrahim Muluka. Thereafter, after hearing the learned advocates for both the parties and after appreciating the evidence led by the prosecution, the learned Judge of the Trial Court accepted the case of the prosecution and he came to a conclusion that appellant was found with conscious possession of 650 grams of Ganja and 165.500 grams of Charas and thereby, the appellant has committed an offence punishable under Sections 20 (b) (i) of the Act. As per the final operative order of the judgement, the learned Judge inflicted two different sentences, one for possession of substance of "Ganja" and other for possession of substance of "Charas" as stated earlier.

#. Being aggrieved against and dissatisfied with the judgement Ex. 62 dated 30.03.1999 of the Trial Court, the appellant has preferred this appeal before this court.

#. We have heard Ms. Shilpa J. Unwala, learned

advocate for the appellant and Mr. B.Y. Mankad, learned APP for the State in detail at length. Learned advocate for the appellant has taken us through the entire evidence of prosecution witnesses as well as the documentary evidence also.

#. During the course of arguments Ms. Shilpa Unwala, learned advocate for the appellant has raised mainly three contentions. According to her, following three irregularities go to the root of the case and in that circumstances, search is vitiated for non-compliance of Section 42 of the Act and on the basis of such search, the trial is illegal and outcome of trial i.e. the judgement is not legal and valid and therefore, the appellant's appeal be allowed and appellant be acquitted of the charges leveled against him. According to her, three contentions are as under :-

(i) That the mandatory provision of Section 42 of Act is not complied with by the present complainant before proceeding further to the house of appellant for search.

(ii) From the record, it appears that there is discrepancy in description of the house number because most of the evidence led by the prosecution show the number of house of appellant to be 4027 but in fact, the number of the house of appellant was 4028 and therefore, this creates a doubt as to in fact which premises was raided and searched by the complainant and members of his raiding party and as this is a case of serious doubt, benefit of doubt be given to the appellant, by acquitting him.

(iii) Panch witnesses of this case have turned hostile to the prosecution and they have not supported the case of the prosecution and therefore, the entire case against the appellant is highlighted on evidence of police officer only. As per her say, the police witnesses were highly interested witnesses and in absence of evidence of any independent available witnesses their testimony cannot be accepted and appellant should be acquitted.

#. Shri B.Y. Mankad, learned APP for the Respondent - State has argued that looking to the documentary evidence, it cannot be said that there is a breach of provisions of Section 42 of the Act. According to him, voluminous documentary evidence is led by the prosecution

to establish that house in which the appellant was residing was raided was of the ownership of appellant. The documentary evidence show that he was residing in house No. 4028 and this mistake cannot be so magnified to seek benefit of doubt in favour of accused. Shri Mankad has argued that merely because the panch witnesses are turned hostile to prosecution, evidence of police witnesses cannot be thrown over board because their evidence should be appreciated as other witnesses before the Court. The police officers acted in furtherance of their official duty which they performed and they have given evidence regarding the fact as to what duty they performed while performing the raid in the house of appellant and therefore, it is wrong to argue that merely because the panch witnesses have turned hostile to prosecution, benefit of doubt should be given to the appellant.

#. We have reappreciated the entire evidence led by the prosecution and considered the submissions made by rival parties of the case. Ms. Unwala has enlarged her arguments on the point that Section 42 of the Act is not complied with before proceeding to house of appellant. She has argued that admittedly, the raid was carried out during the night hours. As per Section 42 (1) of the Act, Police Officer can make raid and search building, conveyance or closed place between sunrise and sunset and if he wants to search any building during the night hours, then as per Section 41 (1) of the Act, he is required to obtain a warrant from the Magistrate or a Magistrate of the First Class specially empowered by the State Government in this behalf. In this case, such type of warrant was not obtained before raiding the house of the appellant.

#. Learned APP Mr. Mankad has drawn our attention to proviso to Sub-section 1 of Section 42 of the Act, which reads as under:-

> "Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief."

The prosecution has examined the complainant, who received a secret information at Ex.24. P.W.-8 Dhanjibhai Badaji Damor, Ex.24 who in term has deposed

that he received secret information from the secret informant that one Mustuffa Abdulraheman Khatki was carrying on business of narcotic substance in his residential house No. 4027 situated in Mullavad in Ankleshwar Town. On receipt of such information he reduced that information into writing. That written information is at Ex.25. Thereafter, he sent said information alongwith his report in sealed cover to Police Officer, Ankleshwar. Thereafter, he sent said written information to his superior officer by letter Ex.27. He has specifically deposed in his deposition that said raid was to be carried out during the night hours immediately without any delay and he rushed to the place of appellant without warrant because he felt that if delay is occurred, the purpose of raid would be frustrated and muddamal would be misplaced from the place of raid and there was a possibility that the offender might escape from the place of offence and therefore, for him there was no time to obtain warrant from the Magistrate and for that reason, he made an entry being Entry No.5 in station diary at 02.45 hours stating interalia the grounds of his belief for immediate search to be carried out without obtaining warrant. That entry is at Ex.28. Thus, in this case, though the complainant did not obtain the warrant from the Magistrate, he complied with the requirements contained in proviso to Sub-section (1) of Section 42 of the Act and in these circumstances, it cannot be said that the complainant has committed breach of Section 42 of the Act. From the record it appears that on the contrary, the complainant had taken due care before proceeding further to appellant's house for carrying out raid. Here in this case, the requirements of provisions of Section 42 are complied with and therefore, it cannot be said that Section 42 is breached by the complainant. In view of this, first contention taken by Ms. Unwala to the effect that complainant has not complied with provisions of Section 42 is rejected.

##. The second contention taken by Ms. Unwala is to the effect that the complaint and the contemporary record alleged to have been prepared at the time of raid show that house, which was raided and searched was bearing house No. 4027 but in fact, the appellant is residing in house bearing house No. 4028. As the complainant received secret information with regard to house bearing House No. 4027, the complainant has mentioned that number in complaint Exh.40 as well as in panchnama Ex.8 as if that number i.e. House No. 4027 was true and correct but during investigation it was found that in fact that house was bearing House No. 4028. The

Investigating Officer collected the documentary evidence on that point. He has produced a xerox copy of the extract of register kept and maintained by Mamlatdar, Ankleshwar for the ration cards at Ex.58. As per an Entry No. 271 for the ration card No.0172426, it relates to house No. 2047 and the holder of ration card No. 0172326 is shown as Khatki Mustuffa Abdulraheman i.e. present appellant and therefore, the secret informant had given a secret information on the basis of this ration card. The prosecution has also produced a voters' list at Ex.43 prepared by the State Election Commission for Election Ward No. 5 of Ankleshwar Municipality. In that voters' list, there is an entry at Sr. No. 992, on page 11, which relates to Mustuffa Abdulraheman i.e. present appellant and house number stated against his name on left side is House No. 4028. The prosecution has also produced an extract from the Assessment Register kept and maintained by Ankleshwar Municipality at Ex.45. As per the copy of Entry No.18 Assessment register for 1996-97, house No. 4028 is in the name of Mustuffa Abdulraheman as owner and thus, though the complaint Ex.40 and panchnama Ex.8 bears the description of house bearing house No. 4027 on the basis of the ration card. In fact, the house bearing No. 4028, was raided and searched on 12.3.1997. This discrepancy makes no matter because from the evidence it is proved that appellant was found in the premises on first floor of the house situated at Mullavad in Ankleshwar town and from his house two contraband articles were found. It may be noted that when raid and search was carried out at the house of the appellant, a cash amount of Rs.19,250/- was found from the house. The appellant claims this amount on the ground that this amount was not in connection with sale of contraband articles but said amount was of his brother as the house of brother was to be repaired and he had received this amount from son-in-law Ibrahim Muluka. The appellant claims this amount to be of his brother, which was found from the house of appellant. From this it is certain that house from which, the appellant was found, was raided and during search contraband articles were found in his house and therefore, mere mistake in mentioning house No. 4027 instead of 4028 does not affect the prosecution case and this doubt cannot be said to be a reasonable doubt. Admittedly, the ration card suggests that house number is 4027 and by on the basis of this ration card under bonafide mistake, the complainant has mentioned that number in his complaint Ex.40 as well as panchnama Ex.8. Under these circumstances, the contention taken by Ms. Unwala deserves to be rejected and accordingly, it is rejected.

##. The third contention taken by Ms. Unwala is to the effect that both the panch witnesses have turned hostile to the prosecution and they have not supported the case of the prosecution and therefore appeal be allowed and appellant be acquitted. The entire case of prosecution rests on the evidence of complainant and other police witnesses. Merely because the panch witnesses have turned hostile, the entire case of prosecution cannot be thrown over board. It is different thing if panch witnesses are not kept present. Here in this case, panch witnesses were kept present through-out the raid and search and in their presence search was made and contraband articles were found and that articles were seized from the house of the appellant. To prove this case, the P.W.8 complainant has given his evidence in detail. He was cross-examined at length but no material was found contrary to the prosecution case. We have reappreciated the evidence of P.W. 8 complainant and panchnama Ex.8 which is produced in the case. It is wrong to say that because the witness is a police officer, his evidence should be disbelieved. After all, he is also a witness to the Court. Here in this case, complainant has given his evidence on the facts relating to the raid and search carried out by him. It was his part of duty and in his official capacity, he has given his evidence. We find nothing, otherwise to hold that his evidence is not believable. Under the circumstances, merely because the panch witnesses have turned hostile to prosecution, the case of prosecution should not be thrown over board. Recently, in one case of RAGHUBHAI GANDABHAI BHARWAD VS. STATE OF GUJARAT in Criminal Appeal No. 12 of 2002 dated 5/6.2.2002, the Division Bench of this court has observed as under :-

"We further find that merely because the panch witnesses do not support the case of the prosecution, the case of the prosecution need not be thrown over board as unreliable. It must be realised that the phenomenon of panch witnesses turning hostile to the prosecution is not unknown and is ever on the increase. It needs hardly to be emphasised that the decision of a case does not depend solely on the question whether the panch witnesses support the prosecution or turn their back on it. If the decision of the case were to depend solely on the testimony of panch witnesses regardless of the evidence of independent witnesses, in theory, it would be giving a right of veto to the panchas so far as the question of culpability of an accused is concerned. If the evidence of police officer is

otherwise found to be true and dependable, judicial pragmatism requires that merely because the panchas do not support, it should not be made a ground to discard his evidence."

##. In the case of MODAN SINGH VS. STATE OF RAJASTHAN, AIR 1978, SC 1511, it has been held by Apex Court that if the evidence of investigating officer who recovered the material objects as to recovery need not be rejected on the ground that seizure witnesses do not support the prosecution version.

##. In the case of STATE OF GUJARAT VS. ANIRUDHSING, AIR 1997 SC 2780, it is held that evidence of police officers cannot be rejected outright as unreliable. It requires to be subjected to careful evaluation like any other witness of occurrence.

##. In the case of KALPNATH RAI VS. STATE, (1997)8 SCC 732, it is made clear by the Apex Court that there can be no legal proposition that evidence of police officers unless supported by independent witnesses is unworthy of acceptance. It is further held that if the evidence of the police officer is found acceptable, it would be an erroneous proposition that the court must reject the prosecution version solely on the ground that no independent witness was examined.

Here in this case, independent panch witnesses were examined, but as it happens in many cases that they have turned hostile to the prosecution. We have carefully examined the evidence of complainant and other police witnesses. Their evidence is found to be trustworthy and acceptable.

Here in this case, the police officers are found to be true and dependable and their evidence inspires confidence. There is no reason to disbelieve them. Under the circumstances, their evidence is acceptable and in view of this, the contention advanced by Ms. Unwala that panch witnesses have turned hostile to the prosecution and as they have not supported the case of the prosecution case should be disbelieved, is rejected.

##. On reappreciation of the evidence, we find that the prosecution has established the case against the appellant beyond reasonable doubt for having kept conscious possession of Ganja and Charas and the learned Judge of the trial Court has rightly convicted the appellant for possessing that contraband articles in his residential house. From the charge, it appears that he

is charged for an offence punishable under Section 20 (b) (i) of the Act. Inspite of the fact that offence is only one, the learned Trial Judge of the Trial Court has inflicted two different sentences for two different substances found from the possession of the appellant, as if he has committed two different and separate offences. We find that this is not proper as the offence is one. Two different separate sentences cannot be inflicted for one offence for possessing two different substances at a time at one place and therefore, sentence inflicted on appellant for having kept possession of Ganja is required to be set aside and therefore, final operative order is required to be modified accordingly.

##. No other contention / submission except above has been made/submitted by Ms. Shilpa J. Unwala, the learned advocate for the appellant/accused.

The learned Trial Judge has sentenced the appellant to undergo R.I. for two and half years and to pay a fine of Rs.10,000/- in default, to undergo further imprisonment for six months for keeping "Ganja" and he is also sentenced to undergo R.I. for 10 years and to pay a fine of Rs.1,00,000/- and in default to undergo further imprisonment for one week. It appears that learned Trial Judge of the Trial Court has by mistake written one week of imprisonment instead of one year because in default of a fine of Rs.10,000/- he has inflicted sentence of six months, while in default of a fine of Rs.1,00,000/- he has inflicted sentence of one week. Therefore, the operative part of the judgement is required to be modified in respect of infliction of sentence for default of payment of a fine of Rs.1,00,000/-.

##. In view of what is discussed hereinabove, this appeal is partly allowed and the judgment of conviction and sentence dated 30.3.99 rendered in Special NDPS Case No.3 of 1997 by the learned Addl.Sessions Judge, 2nd Court, Bharuch is accordingly modified. The sentence with regard to possession of Ganja i.e. rigorous imprisonment for two and half years and fine of Rs.10,000/- (Rs. Ten Thousand only) and in default of fine, imprisonment for six months is set aside.

The appellant is sentenced to undergo R.I. for 10 years for committing the offence punishable under Section 20 (b)(i) of the Narcotic Drugs & Psychotropic Substances Act,1985 for possessing both 'Ganja' and 'Charas' and to pay a fine of Rs.1,00,000/- (Rs. One Lakh only) and in default, to undergo further R.I. for one year. The rest of the operative part of the

judgement of conviction and sentence dated 30.3.99 rendered in Special NDPS Case No.3 of 1997 by the learned Addl.Sessions Judge, 2nd Court, Bharuch stands as it is."

Date:2 .7.2002 (D.K.Trivedi,J.)

(H.H. Mehta, J.)
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